(5)

No. 88-1916

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MINNESOTA, PETITIONER

v.

RALPH D. OLSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
STEPHEN J. MARZEN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

33 pp

QUESTIONS PRESENTED

1. Whether the defendant had a legitimate expectation of privacy in the home in which he had spent the previous night as a guest.

2. Whether exigent circumstances justified the warrantless entry of a home to arrest the defendant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Cases – Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1916

STATE OF MINNESOTA, PETITIONER

v.

RALPH D. OLSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents two questions: whether the Fourth Amendment protects an overnight guest against an unlawful search of his hosts' home and, if so, whether exigent circumstances justified the warrantless entry into the home in this case.

Fugitives from justice and other suspects are frequently found in the homes of others. Accordingly, the United States has a significant law enforcement interest in the resolution of the question when, if ever, house guests can claim the protection of the Fourth Amendment in the premises in which they are found. In addition, federal law enforcement agents must often arrest criminal suspects without warrants either in their own homes or the homes

of others on the basis of exigent circumstances. The United States therefore has an interest in the Court's analysis and conclusion with respect to when circumstances are sufficiently exigent to permit law enforcement officers to make a warrantless entry into a home to make an arrest.

STATEMENT

Following a jury trial in the Hennepin County, Minnesota, District Court, respondent was convicted on one count of first degree murder, three counts of armed robbery, and three counts of second degree assault. He was sentenced to life imprisonment on the murder count and a total of nine years' imprisonment on the three armed robbery counts. The second degree assault counts merged into the armed robbery counts for purposes of sentencing. On appeal, the Minnesota Supreme Court reversed respondent's convictions and ordered a new trial. Pet. App. A1-A14.

1. Just before 6 a.m. on the morning of July 18, 1987, a lone gunman robbed a gasoline station in Minneapolis, Minnesota, and shot and killed the station manager. The police learned of the robbery almost immediately and received a description of the robber that seemed to match Joseph Ecker. Two officers promptly drove to Ecker's home. At about 6:15 a.m., just as the officers arrived at Ecker's home, a brown Oldsmobile appeared in a nearby alley. The officers left their squad car, drew their weapons, and approached the Oldsmobile. The driver of the Oldsmobile put the car into reverse and rapidly backed away from the officers. The officers ran back to their squad car and pursued the Oldsmobile. Pet. App. A2, A16-A17.

The driver of the Oldsmobile lost control of the car as he tried to turn out of the alley. Two persons then jumped

out of the Oldsmobile and ran away on foot. After additional officers arrived, the police searched Ecker's house and captured Ecker inside. Ecker was later identified as the gasoline station gunman. The other occupant of the Oldsmobile escaped. The officers then searched the Oldsmobile. They found a sack of money and a gun that was later identified as the murder weapon. They also found a certificate of title to the car containing respondent's name and a letter addressed to "Roger R. Olson." In addition, they found a video movie rental receipt made out to respondent and dated July 16, 1987, just two days earlier. The police verified that respondent lived at the address listed on the letter. Pet. App. A2, A17.

The next day, the police received a call from a woman who said that a man named "Rob" had told several persons that he was the driver of the getaway car in the gasoline station robbery. The caller added that "Rob" was planning to leave town soon by bus. She further told the police that two of the persons "Rob" had told about his involvement in the crime were Louanne and Julie Bergstrom, who lived at 2406 Fillmore, N.E., in Minneapolis. Pet. App. A3, A17-A18.

Two detectives went to the house at that address, which was a duplex. A woman who lived in the lower unit said that the Bergstroms lived in the upper unit but were not home. She added that respondent was staying upstairs but was absent at the moment. She promised to call the police when respondent returned. Pet. App. A3, A18.

At approximately 2 p.m. that afternoon, the police department issued an order to pick up respondent. Thirty to 45 minutes later, the woman from the lower unit of the duplex called the police and said that respondent had returned to the upstairs unit. Once again, officers were dispatched to that address. Pet. App. A3-A4, A18-A19.

After the officers had taken positions outside the duplex, a police detective telephoned the upstairs unit and reached Julie Bergstrom. The detective told her that he wanted respondent to come outside, whereupon the detective overheard a male voice whisper, "Tell them I left." Bergstrom then told the detective, "Rob left already." Pet. App. A4, A19.

The detective relayed that exchange to the officers stationed outside the house. The officers then drew their weapons and entered the house. They found respondent hiding in a closet and placed him under arrest. After his arrest, respondent admitted that he drove the Oldsmobile getaway car in the robbery. Pet. App. A4, A19.

2. The trial court denied respondent's motion to suppress his pretrial statement. At the suppression hearing, respondent testified that (1) he stayed with the Bergstroms one night; (2) he had no bed and slept on the floor; and (3) he had not used any closet or dresser in the house, and he had only one bag of clothes, which he was carrying with him. Pet. App. A19. Based on that evidence, the trial court held that respondent had no reasonable expectation of privacy in the Bergstroms' house. Pet. App. A20-A22. The court therefore concluded that respondent lacked standing to challenge the admission of his statement to the police, even if that statement was the product of an illegal entry into the Bergstroms' house. Pet. App. A21.

3. The Minnesota Supreme Court reversed. It first held that respondent had standing to challenge the police entry into the premises at 2406 Fillmore. The court held that respondent had a legitimate expectation of privacy as a guest in the Bergstroms' home because he "had permission to stay at 2406 Fillmore for some indefinite period," and because Louanne Bergstrom had testified that respondent "had the right to allow or refuse visitors entry."

Pet. App. A8. The court drew an analogy between respondent's situation and that of the defendant in *Jones* v. *United States*, 362 U.S. 257 (1960). The court found sufficient similarity between the circumstances of respondent and Jones because both defendants had been overnight guests and had only a few clothes with them during their respective stays, even though Jones, unlike respondent, was the solitary occupant of his friend's apartment and possessed a key. See 362 U.S. at 259.

The court next turned to the question whether exigent circumstances justified a warrantless entry into the Bergstroms' home. To determine whether exigent circumstances existed, the court applied the balancing test proposed in *Dorman* v. *United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970) (en banc). As applied by the Minnesota Supreme Court, that test calls for the court to balance the following factors:

> (a) whether the offense is a grave offense, particularly a crime of violence; (b) whether the suspect is reasonably believed to be armed; (c) whether the showing of probable cause connecting the defendant to the offense is more than minimal; (d) whether the police have strong reasons to believe that the suspect is in the premise being entered; and (e) whether there is a likelihood that the suspect will escape if not swiftly apprehended.

Pet. App. A10 n.1.[1]

Applying the *Dorman* test to the facts of this case, the Minnesota Supreme Court concluded that the circumstances were not sufficiently exigent to justify the war-

[1] The court of appeals in *Dorman* actually listed seven factors. In addition to the five listed by the Minnesota Supreme Court, the remaining two factors were whether the entry was made peaceably and whether the entry was made at night. 435 F.2d at 393.

rantless entry into the Bergstroms' unit to arrest respondent. Factor (a) was uninformative, according to the court, because although murder is a grave crime, respondent only drove the getaway car. Factor (b) counseled weakly against a finding of exigent circumstances, because the police had already recovered the murder weapon, which the court concluded meant that respondent was probably unarmed. Factor (c) also counseled weakly against a finding of exigent circumstances; the Minnesota Supreme Court did not reject the trial court's finding of probable cause, but it did state that probable cause depended "in large part on the reliability of the unknown informant." Factor (d) favored a finding of exigent circumstances, because the police had strong reason to believe that respondent was in the duplex when they entered it. Factor (e) was apparently the dispositive consideration for the Minnesota Supreme Court: respondent had not yet left town, the police knew where he was, and the presence of "[t]hree or four Minneapolis police squads" surrounding the house meant that respondent "was going nowhere." Pet. App. A10-A11.

Under these circumstances, the court held, the police should have tried to obtain an arrest warrant for respondent before entering the Bergstroms' home to arrest him. The court acknowledged that it was not clear that the police could have obtained an arrest warrant in the hour between the time the police issued the pick-up order for respondent (2 p.m.) and the time the police arrived at the Bergstroms' house (approximately 3 p.m.). The court noted, however, that the State did not "suggest[] that the warrant could not have been obtained," and a warrant to search the Oldsmobile was obtained in two and one half hours on the previous day "when the urgency to search an already impounded car was much less." Pet. App. A12.

Accordingly, the court concluded that the State failed to meet its burden to establish exigent circumstances, and the entry into the Bergstroms' home was therefore unlawful. Pet. App. A13-A14.

SUMMARY OF ARGUMENT

1. The Fourth Amendment did not protect respondent, an overnight guest, from an unlawful entry into the Bergstroms' home. In order to mount a Fourth Amendment challenge to a search, the defendant must show that he had a legitimate expectation of privacy in the property that was searched. Respondent may not claim a legitimate expectation of privacy in the Bergstroms' home because he had neither a property interest in that home nor an equivalent non-property interest recognized by social convention. The best measure of respondent's lack of any property or non-property interest sufficient to trigger Fourth Amendment rights is that respondent did not have the right to exclude others from the Bergstroms' home or from the place in the home where he was found. The fact that respondent was legitimately on the premises as an invited guest is not sufficient to give him a right to challenge an entry into the premises; a person who bases his Fourth Amendment challenge solely on his legitimate presence on the premises is not challenging the invasion of his own rights, but is in effect challenging the invasion of the rights of the third parties whose guest he was.

2. Even if respondent had standing to challenge the police entry into the Bergstroms' home, the state court was wrong in suppressing his post-arrest statements, because exigent circumstances justified the warrantless entry. The state court relied on a multi-factor test to find that the police acted without exigent circumstances. Based on that test, the state court concluded that the police should not

have entered the Bergstroms' house even after respondent learned that the police were pursuing him and knew where he was.

The multi-factor test on which the state court relied lacks sufficient predictability to guide law enforcement officers in the highly charged setting of a police stake-out. A simpler and clearer rule would provide better guidance to police without encroaching on Fourth Amendment interests. In our view, the circumstances should be deemed exigent when a suspect who is implicated in a serious crime or who is thought to be armed discovers that he has been cornered by the police and faces imminent arrest. In that setting, a delay in arresting the suspect creates risks to the police, to other persons in the house where the suspect is staying, and to innocent passers-by. A suspect cornered in that fashion over a several-hour period may, at the least, seek to destroy evidence, or he may take hostages, attempt a break-out, or engage in a shoot-out with the police. Because of the dangers so often presented in that setting, the police should not have to identify a particular risk that renders the circumstances exigent in a particular case. Instead, the police should be entitled to act without delay in order to defuse an inherently volatile situation before the danger materializes in the form of injury to persons or loss of evidence.

ARGUMENT

I. AN OVERNIGHT GUEST ORDINARILY DOES NOT ENJOY FOURTH AMENDMENT RIGHTS IN HIS HOST'S PREMISES

A. To Invoke The Protection Of The Fourth Amendment With Respect To Physical Searches Of Real Or Personal Property, A Defendant Must Prove He Had A Right To Exclude Others From The Premises

In *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978), this Court held that the "capacity to claim the protection of the Fourth Amendment depends * * * upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." That test, derived from *Katz* v. *United States*, 389 U.S. 347, 353 (1967), requires that a defendant have a subjective expectation of privacy that society recognizes as reasonable. *Rakas*, 439 U.S. at 143-144 n.12; *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The requirement that a defendant have a legitimate expectation of privacy follows from the principle that Fourth Amendment rights are personal in nature: "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of *his* Fourth Amendment rights infringed." 439 U.S. at 134 (emphasis added). Thus, *Rakas* disapproved the reasoning of *Jones* v. *United States*, 362 U.S. 257, 267 (1960), which had allowed anyone "legitimately on the premises" to contest a search or seizure, because that standard allowed defendants to assert the Fourth Amendment rights of third parties. The legitimately-on-the-premises standard

> would permit a casual visitor who has never seen, or been permitted to visit, the basement of another's house to object to a search of the basement if the

> visitor happened to be in the kitchen of the house at the time of the search. Likewise, a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends would be able to contest the legality of the search. The first visitor would have absolutely no interest or legitimate expectation of privacy in the basement, the second would have none in the house, and it advances no purpose served by the Fourth Amendment to permit either of them to object to the lawfulness of the search.

439 U.S. at 142.

The first clause of the Fourth Amendment makes clear that the Amendment focused principally on the protection of interests in property. The clause states that the Amendment protects "[t]he right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures * * * *."[2] As applied to physical searches of real or personal property, that language suggests that ordinarily a defendant must have a property interest in the place or thing that is searched in order to have a right to object to the search. See *Simmons* v. *United States*, 390 U.S. 377, 389-390 (1968); *Goldman*

---

[2] As originally drafted by James Madison, the emphasis on property rights was even clearer. The draft amendment safeguarded "[t]he rights of the people to be secured in *their* persons[,] *their* houses, *their* papers, and *their other property*, from all unreasonable searches and seizures * * * *." 1 Annals of Cong. 452 (1789) (emphasis added). The version of the amendment reported by the Committee of Eleven deleted the repetitious use of the possessive "their," and narrowed the phrase "other property" to "effects." *Id.* at 783. The Committee of Three split the amendment into two clauses, one securing the people's liberty from unreasonable searches and seizures and a second regulating the use of warrants. But the Framers' intention to protect property rights is evident at every stage of the drafting process.

v. *United States*, 316 U.S. 129, 134-136 (1942); *Olmstead* v. *United States*, 277 U.S. 438, 464-466 (1928). To have a property interest in particular premises generally means that the owner enjoys the right to exclude others from the premises. For of all the rights attaching to property, perhaps the most important is the right to exclude others. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979) ("the 'right to exclude' * * * [is] universally held to be a fundamental element of the property right"). See 2 W. Blackstone, *Commentaries*, ch. 1. Thus, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas*, 439 U.S. at 144 n.12.

In *Katz* v. *United States*, this Court rejected the contention that the Fourth Amendment "limits only searches and seizures of tangible property" and extended the Constitution's protection to persons who have a legitimate expectation of privacy in a particular place or thing. 389 U.S. at 352-353; *id.* at 361 (Harlan, J., concurring). The Court in *Katz* did not attempt to define with precision when persons can be said to have a legitimate expectation of privacy, and the Court has not subsequently embraced any single test for making that determination. We submit that, at least in the case of physical searches of real or personal property, a person who does not have a recognized legal interest in property may invoke the protection of the Fourth Amendment with respect to that property only if he enjoys the distinguishing feature and chief quality of the property rights that are explicitly protected by the Amendment – the right to exclude others. Thus, in order for a person to have a protected Fourth Amendment interest in a particular place, he must have a right to exclude others from that place, either by "reference to concepts of

real or personal property law," or by virtue of "understandings that are recognized and permitted by society." *Rakas,* 439 U.S. at 144 n.12.

The "right to exclude" test is consistent with this Court's Fourth Amendment decisions. In *Katz,* for example, the Court held that a defendant who placed a telephone call in an enclosed booth had a legitimate expectation of privacy. 389 U.S. at 352-353, 359. The "critical fact," *id.* at 361 (Harlan, J., concurring), on which that privacy expectation rested was the defendant's reasonable assumption that when he closed the door behind him—thereby excluding others from his conversation—he would not be overheard:

> One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

Id. at 352 (opinion of Court). Although the defendant in *Katz* may not have had a possessory interest in the telephone booth for purposes of state property law, he had a right to exclude others for the duration of his telephone call as a matter of social custom and convention, and for that reason had a legitimate expectation of privacy.

The same right-to-exclude theme runs through the examples of other legitimate expectations of privacy provided by the *Katz* Court. The Court remarked that "[n]o less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." 389 U.S. at 352. In the case cited in the margin to illustrate the first example, *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920), the defendants were father

and son and owned the company, *id.* at 390; by virtue of their ownership interest, the Silverthornes had the undoubted right to exclude others from the plant and grounds and therefore enjoyed a legitimate expectation of privacy in their business office. Likewise, in the case cited to illustrate the second example, *Jones* v. *United States, supra,* "Jones had complete dominion and control over the apartment" and, "[e]xcept with respect to his friend" who rented the apartment and was away on a five-day trip at the time, Jones "could exclude others from it." *Rakas,* 439 U.S. at 149. Finally, in the case cited to illustrate the third example, *Rios* v. *United States,* 364 U.S. 253, 262 n.6 (1960), the Court observed that "[a]n occupied taxicab is not to be compared to * * * a vacated hotel room, *Abel* v. *United States,* 362 U.S. 217 [(1960)]" (where the hotel management has the "exclusive right to its possession," 362 U.S. at 241), but is presumably to be likened to an occupied hotel room (which is a "temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable." *Katz,* 389 U.S. at 361 (Harlan, J., concurring)). The common denominator among the Court's examples is a right to exclude others, whether that right is conferred by state property law or by shared social understandings.

Since *Katz,* this Court has continued to recognize that the right to exclude is a key element in determining whether an individual has a legitimate expectation of privacy in a particular object or place. In *Rakas* v. *Illinois,* 439 U.S. at 149, the Court noted that unlike the defendents in *Jones* and *Katz,* the defendants in *Rakas* had no right to exclude others from the areas of the automobile where the incriminating evidence was seized. Similarly, in *Rawlings* v. *Kentucky,* 448 U.S. 98, 105-106 (1980), the Court pointed to the defendant's lack of any

right to exclude others from access to an acquaintance's purse in explaining why the defendant could not be deemed to have a legitimate expectation of privacy in the purse.

To be sure, the "right to exclude" does not provide a simple, bright-line rule that can resolve every case. In some cases, a right to exclude may not be enough to ensure the protection of the Fourth Amendment. It is well-settled, for example, that the Fourth Amendment does not protect against entry into "open fields," even if the owner of the fields has a right under local law to exclude trespassers. See *Oliver* v. *United States,* 466 U.S. 170, 177-181, 183-184 (1984). The same may be true for other invasions of property rights that are de minimis in nature and therefore not considered "searches" under Fourth Amendment law even though the owner of the property may have a technical legal right against trespass. See, *e.g.*, *New York* v. *Class,* 475 U.S. 106 (1986) (opening of automobile door to see inspection sticker not a "search"); *Cardwell* v. *Lewis,* 417 U.S. 583, 591-592 (1974) (plurality opinion) (taking paint scrapings from automobile not a "search" under the circumstances). As another example, a friend who is asked to watch a homeowner's house for a brief period of time while the owner is away may have a right to exclude others from the premises, but may not have a legitimate expectation of privacy under state property law or shared social conventions. Nonetheless, we submit that the "right to exclude" test serves as a useful guideline for most cases involving searches of real and personal property, and at least where a right to exclude is absent, Fourth Amendment protections should not be found to apply.[3]

[3] While we believe that the "right to exclude" test is a useful device for analyzing physical searches of real and personal property, it is not as useful in determining whether other kinds of invasions, such as the interception of conversations, *Berger* v. *New York,* 388 U.S. 41

B. Overnight Guests Such As Respondent Have No Right To Exclude Others

1. In most circumstances, an overnight guest such as respondent will lack a right to exclude others and for that reason will have no legitimate expectation of privacy in the host's home. To begin with, overnight guests—like casual visitors—have no legitimate expectation of privacy conferred by property law because they neither own nor possess the host's house under state property law. Social conventions similarly do not support an expectation of privacy for a guest in most areas of the host's home. When a guest is invited into a home, the host waives his right to eject the guest as a trespasser; the host does not delegate to his guest *his* right to eject *others* as trespassers. For example, a defendant could not object if the host held a party to which he invited some neighbors who happened to be police officers. Nor could the guest object if the host consented to the police officers' entry. Generally speaking, guests have no right to exclude others from shared areas of the house (like the kitchen, dining room, living room, and bathrooms) or from areas of the home reserved for the host's exclusive use (such as the host's bedroom).[4] Cf.

(1967), or the taking of urine samples for drug testing, *National Treasury Employees Union* v. *Von Raab,* 109 S. Ct. 1384 (1989), constitute "searches" within the meaning of the Fourth Amendment

[4] See, *e.g.*, *United States* v. *Nabors,* 761 F.2d 465, 468-470 (8th Cir.) (defendant who was merely present at time of search had no legitimate expectation of privacy), cert. denied, 474 U.S. 851 (1985); *United States* v. *Adamo,* 742 F.2d 927, 947-948 (6th Cir. 1984) (guest at birthday party had no legitimate expectation of privacy to contest search of apartment), cert. denied, 469 U.S. 1193 (1985); *United States* v. *Robinson,* 698 F.2d 448, 454-455 (D.C. Cir. 1983) (mere guest had no legitimate expectation of privacy); *United States* v. *Meyer,* 656 F.2d 979, 980-982 (5th Cir. 1981) (defendants lacked legitimate expectation of privacy to contest "illegal warrantless search of the bathroom cabinet"—"a room they do not allege to have entered"), cert. denied, 465 U.S. 1065 (1984); *Chupp* v. *State,* 509 N.E.2d 835, 838 (Ind. 1987) (visitor to house lacked legitimate expec-

Rakas, 439 U.S. at 148-149. At most, overnight guests have the right to exclude others from the guest bedroom—an area that the host usually surrenders to his visitor for the duration of his stay and with respect to which social convention recognizes that the host can be said to delegate his right to exclude others.[5]

---

tation of privacy to contest search of another visitor's bag because he "had no control over the premises"); *Lee* v. *State,* 419 N.E.2d 825, 828 (Ind. App. 1981) (defendant lacked legitimate expectation of privacy as overnight guest in house trailer); *People* v. *Carter,* 128 Mich. App. 541, 547, 341 N.W.2d 128, 132 (1983) (per curiam) (defendant had no expectation of privacy in bathroom he was using at the time of the search because he was "merely a transient visitor" who "only occasionally spent the night there"), rev'd on other grounds, 422 Mich. 938, 369 N.W.2d 852 (1985); *Hicks* v. *State,* 96 Nev. 82, 83, 605 P.2d 219, 220 (1980) (defendant who was present in apartment lacked legitimate expectation of privacy to contest search); *People* v. *Rodriguez,* 69 N.Y.2d 159, 164, 513 N.Y.S.2d 75, 78, 505 N.E.2d 586, 589 (1987) (defendant sleeping alone in apartment lacked legitimate expectation of privacy because he "was a transient who had no indicia of legitimate or recognizable connection to the apartment where he was arrested or any relevant thing in that apartment," which belonged to his drug supplier); *Commonwealth* v. *Tann,* 500 Pa. 593, 459 A.2d 322, 325 (1983) (defendant had no legitimate expectation of privacy when present only for a social visit for 10-15 minutes). But see *United States* v. *Echegoyen,* 799 F.2d 1271, 1277 (9th Cir. 1986) (defendant had a legitimate expectation of privacy because he was present at time of search and "was an invited overnight guest"); *State* v. *Adkins,* 346 S.E.2d 762, 766 (W.Va. 1986) (defendant had a legitimate expectation of privacy because he was present at time of search and "was more then a casual visitor").

[5] See, *e.g., United States* v. *Rackley,* 742 F.2d 1266, 1270 (11th Cir. 1984) (house guests had legitimate expectation of privacy, if at all, limited to guest bedroom where they stayed and not in other parts of premises where evidence found).

Although an overnight guest generally lacks a legitimate expectation of privacy in most areas of his host's home, particular types of guests may well have a legitimate expectation of privacy in some circumstances. First, where state property law gives a possessory interest to a guest, the guest has a legitimate expectation of privacy. A hotel guest, for example, has a legitimate expectation of privacy in his hotel room for that reason.[6] In addition, social conventions can bestow an expectation of privacy. A house sitter who is given temporary possession of an apartment or home for more than a brief period of time has a legitimate expectation of privacy in the premises.[7] *Jones* v. *United States, supra,* illustrates that point. "Jones had a legitimate expectation of privacy in the premises he was using * * * even though his 'interest' in those premises might not have been a recognized property interest at common law." *Rakas,* 439 U.S. 143. The reason was that during his friend's absence, Jones "had complete dominion and control over the apartment and could exclude others from it." *Id.* at 149. For similar reasons, a host's long-term, live-in companion may share the host's right to exclude others.[8]

---

[6] See, *e.g., United States* v. *Lyons,* 706 F.2d 321, 326-329 (D.C. Cir. 1983) (occupant of hotel room has a legitimate expectation of privacy because room is "tendered for his sole use during this stay in the city").

[7] See, *e.g., State* v. *Isom,* 196 Mont. 330, 338, 641 P.2d 417, 421 (1982) (defendant had a legitimate expectation of privacy because he "was the sole occupant of the residence at the time of the search and had control and dominion over it to the exclusion of others").

[8] See, *e.g., People* v. *Wagner,* 104 Mich. App. 169, 175, 304 N.W.2d 517, 520 (1981) (defendant had legitimate expectation of privacy because he had moved into his girlfriend's townhouse, had been there an indefinite time, and kept his clothes there); *State* v. *Whitehead,* 229 Kan. 133, 137, 622 P.2d 665, 669 (1981) (defendant had legitimate expectation of privacy because he "lived there with Ms. Presley on an

2. Respondent had no right to exclude others from either the Bergstroms' residence as a whole or the shared bedroom on whose floor he had slept the previous night. To be sure, the Minnesota Supreme Court found that respondent had a "right to allow or refuse visitors entry" and that respondent had "permission to stay at 2406 Fillmore for some indefinite period." Pet. App. A8. But the factual predicate on which the court based its conclusion that respondent had a right to exclude others is so emphemeral that it could be satisfied in virtually every case. The court based its finding on the testimony of Louanne Bergstrom. Pet. App. A8. Ms. Bergstrom's testimony, however, concerned respondent's authority to admit or exclude *his guests,* not the Bergstroms', and even on that point, the testimony was equivocal:

> Q. [by defense attorney]: And if somebody came over to see [respondent], did he have your permission to admit them or refuse to admit them?
>
> A. [by Louanne Bergstrom]: I don't know. It was never discussed.
>
> Q. Had somebody come over to visit [respondent], would you have allowed him to decide if that person would visit with him?
>
> A. If I saw no reason not to.

Pet. 7 (quoting R. 192).[9]

---

irregular basis"); *State* v. *Allen,* 188 Mont. 135, 141, 612 P.2d 199, 202 (1980) (defendant had legitimate expectation of privacy in apartment because he "shared it with his girl friend and except with respect to her had complete dominion and control over the apartment and could exclude others from it").

[9] The court's "finding" that Olson had the right to exclude others from the Bergstroms' home is not a factual finding binding on this Court. Because the state court's conclusion that Olson had the

The colloquy between respondent's attorney and Louanne Bergstrom fails to discharge respondent's burden to prove that he had a right to exclude others from the Bergstroms' home. See *Rakas,* 439 U.S. 131 n.1. There is no testimony to suggest that respondent had the right to exclude from the premises other guests who might have been admitted by the Bergstroms (such as the police); respondent therefore lacked a legitimate expectation of privacy in the premises as a whole. Even if respondent's legitimate expectation of privacy turned on his right to admit or exclude *his own* guests – which it does not – the colloquy reveals that respondent had a right to exclude only if his host "saw no reason not to" contradict his decision. A "right" conditioned on the approval of another, however, is no right at all; any guest has a "right" to admit or exclude others as long as the exercise of that "right" is consistent with the host's own desires.

More fundamentally, the question whether respondent had the right to exclude others from the Bergstroms' house should be determined not by any express authorization given by Louanne Bergstrom, but by respondent's actual use of the premises in light of shared social conventions. In this case, there is no evidence that respondent in fact had the right to exclude others from the Bergstroms' home, and that fact, in view of the societal understanding that overnight guests usually do not have the right to exclude others from the common areas of the house, establishes that respondent cannot contest the police of-

---

right to exclude others presupposes application of the correct legal standard (*e.g.,* whether the right need encompass only Olson's guests or the Bergstroms' as well), it is a mixed finding of law and fact to which no special deference is due. See *Turner* v. *Safley,* 482 U.S. 78, 93-94 n.* (1987); *Bose Corp.* v. *Consumers Union of United States, Inc.,* 466 U.S. 485, 501 (1984); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.,* 456 U.S. 844, 855 n. 15 (1982).

ficers' entry into the Bergstroms' home. The contrary rule would allow legitimate expectations of privacy to be created by unilateral oral assignment rather than property interests grounded in state law or shared social customs.[10]

Nor did respondent have a right to exclude others, including the police, from the bedroom closet in which he was found. Respondent was not found in a bedroom given by Louanne Bergstrom for respondent's exclusive use. To the contrary, respondent slept for a single night on the floor of the bedroom and shared those quarters with one or more of the Bergstroms. In no sense did respondent acquire privacy interests in the bedroom by virtue of the very brief and casual use he made of it.

Without a right to exclude others, respondent's expectation of privacy rested, according to the Minnesota Supreme Court, on the open-ended duration of his stay. But that fact says no more than that respondent was legitimately on the premises at the time the police arrested him. It therefore bears a fatal resemblance to the test for Fourth Amendment standing declared in *Jones* v. *United States*, 362 U.S. at 267, and overruled in *Rakas* v. *Illinois*, 439 U.S. at 142, because it created "too broad a gauge for measurement of Fourth Amendment rights." Because respondent lacked a right to exclude others from the Bergstroms' home and the bedroom closet within, he could not contest the legality of the police officers' search of either place.

---

[10] If Fourth Amendment rights could be so easily assigned, a homeowner presiding over a meeting of narcotics dealers could kick off the transactions by announcing that "I delegate to everyone present the right to exclude others, particularly the police, from my house." Cf. *Rakas*, 439 U.S. at 167 (White, J., dissenting).

II. EXIGENT CIRCUMSTANCES EXIST WHENEVER A SUSPECT IMPLICATED IN A VIOLENT CRIME OR THOUGHT TO BE ARMED DISCOVERS THAT HE HAS BEEN CORNERED BY POLICE

It is well recognized that probable cause and exigent circumstances can support a warrantless arrest inside a home. See *Welsh* v. *Wisconsin*, 466 U.S. 740, 749 & n.11 (1984); *Steagald* v. *United States*, 451 U.S. 204, 211 (1981); *Payton* v. *New York*, 445 U.S. 573, 583 (1980); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 477-478 (1971). What is less clear is what standard should be used to determine whether the circumstances are sufficiently exigent to permit a warrantless entry.

1. In holding that the circumstances in this case did not sufficiently justify the warrantless entry into the Bergstroms' home, the Minnesota Supreme Court used a multi-factor test first proposed in *Dorman* v. *United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970) (en banc). That test looks to the following factors in determining exigency: the gravity of the offense, the possibility that the suspect is armed, the degree of probable cause, the probability that the suspect is on the premises, the likelihood of escape, the circumstances of the entry, and the time of the entry.

Although *Dorman* has been widely followed,[11] the experience of the lower courts in applying the *Dorman* test

---

[11] See, *e.g.*, *United States* v. *Crespo*, 834 F.2d 267, 270 (2d Cir. 1987), cert. denied, 108 S. Ct. 1471 (1988); *United States* v. *Standridge*, 810 F.2d 1034, 1037 (11th Cir.) (per curiam), cert. denied, 481 U.S. 1072 (1987); *United States* v. *Baldacchino*, 762 F.2d 170, 176-177 (1st Cir. 1985); *United States* v. *Martinez-Gonzalez*, 686 F.2d 93, 100-102 (2d Cir. 1982); *United States* v. *Kulcsar*, 586 F.2d 1283, 1287 (8th Cir. 1978); *United States* v. *Campbell*, 581 F.2d 22, 26 (2d Cir. 1978); *United States* v. *Shye*, 492 F.2d 886, 891-892 (6th Cir. 1974); *Salvador* v. *United States*, 505 F.2d 1348, 1351-1352 (8th Cir. 1974); *Vance* v. *North Carolina*, 432 F.2d 984, 990-991 (4th Cir. 1970). See generally *Welsh* v. *Wisconsin*, 466 U.S. at 751. But see *Llaguno* v. *Mingey*, 763 F.2d 1560, 1564 (7th Cir. 1985) (en banc) (rejecting *Dorman's* "checklist-type analysis" in favor of reasonableness inquiry).

reveals that it fails what should be its principal purpose: to guide police officers seeking to stay within constitutional bounds. See *New York* v. *Belton*, 453 U.S. 454, 458 (1981). The *Dorman* test simply describes some of the considerations bearing on the decision whether exigent circumstances are present in a particular case and leaves it at that. It fails to resolve any case in which the seven factors point in more than one direction. This case furnishes a perfect illustration of the problem. In favor of a finding of exigent circumstances, the Minnesota Supreme Court found that the police had strong reason to believe that respondent was on the premises. Against a finding of exigent circumstances, the state court found that respondent did not have the murder weapon, that there was not strong probable cause to implicate him in the robbery/murder,[12] and that the likelihood of respondent's escape was minimal because the police had the premises surrounded. The court thought that the gravity of the crime was unilluminating because respondent was suspected only of driving the getaway car.

One can, of course, quarrel with the Minnesota Supreme Court's application of the *Dorman* factors in this case. Although the police had recovered the murder weapon from the Oldsmobile, the search of that car had uncovered two holsters, and no other handgun was found. Pet. App. A33. The police could therefore reasonably have supposed that respondent was armed. Moreover, as

[12] The Minnesota Supreme Court did not review the trial court's finding of probable cause because it concluded that the warrantless entry into the Bergstroms' house violated the Fourth Amendment without regard to whether the police had probable cause to link respondent to the crime. Pet. App. A7. That issue would be open on remand in the event that this Court reverses the judgment of the Minnesota Supreme Court.

the driver of a getaway car involved in an armed robbery and murder, the charges respondent faced were very serious (as respondent's ultimate convictions and sentence prove). They gave respondent every reason to resist capture or to flee, as he had done once when stopped by the police in the Oldsmobile and as the anonymous tipster warned that he planned to do again.

The problem, however, lies not just with the state court's application of the *Dorman* test to the facts of this case but with the *Dorman* test itself. That test simply cannot resolve cases in which the factors point in more than one direction—which is not a rare occurrence. See, *e.g.*, *United States* v. *Lindsay*, 506 F.2d 166, 171-172 (D.C. Cir. 1974); *Commonwealth* v. *Wagner*, 486 Pa. 548, 557-558, 406 A.2d 1026, 1031 (1979). The test thus lacks descriptive power—*i.e.*, the capacity to explain judicial decisions. More importantly, the *Dorman* test lacks prescriptive power—*i.e.*, the ability to predict in advance of a judicial decision whether the circumstances are sufficiently exigent to justify the police in proceeding without a warrant. See *Welsh*, 446 U.S. at 761-762 (White, J., dissenting). As Professor LaFave correctly observes, the *Dorman* test requires "the making of on-the-spot decisions by a complicated weighing and balancing of a multitude of imprecise factors" and is therefore "too sophisticated" to be applied "correctly with a fair degree of consistency by well-intentioned police officers." 2 W. LaFave, *Search and Seizure* § 6.1(f), at 599-600 (2d ed. 1987).[13]

[13] Accord, Donnino & Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 Alb. L. Rev. 90, 99-106 (1980); Harbaugh & Faust, *"Knock on Any Door"—Home Arrests After* Payton *and* Steagald, 86 Dick. L. Rev. 191, 225 (1982); Note, 1978 U. Ill. L.F. 655, 678.

2. Although we do not propose a universal test for determining the existence of exigent circumstances, considerable certainty would be provided in an important area by a rule that circumstances are exigent whenever a suspect implicated in a violent crime or thought to be armed discovers that he has been cornered by the police. In that circumstance, the only alternative to an immediate warrantless entry and arrest of the suspect is for some officers to stake out the premises while others attempt to obtain a warrant.

If a fugitive suspected of perpetrating a violent crime discovers that he is the target of a stake-out, the police face a serious risk of evidence destruction, hostage-taking, or a shoot-out endangering themselves and innocent passersby. The appearance of police officers confirms to the suspect that the police have discovered "both his identity and his address." *United States* v. *Crespo*, 834 F.2d at 271. Their appearance creates a likelihood that "evidence might be destroyed if they [do] not enter the apartment swiftly." *Ibid.* "More importantly, any delay increase[s] the risk that innocent members of the public might be injured if [the suspect] attempt[s] to leave." *United States* v. *Standridge*, 810 F.2d at 1037; *United States* v. *Salvador*, 740 F.2d 752, 758 (9th Cir. 1984), cert. denied, 469 U.S. 1196 (1985). "It [is] safer to arrest [the suspect] immediately * * * than to wait for a warrant, and to risk a gun battle erupting in the halls, stairs, lobby or other public area" should the suspect try to escape. *United States* v. *Standridge*, 810 F.2d at 1037. For those reasons, courts should not "second-guess th[e] tactical decision [of the police on the scene] to deny the suspect the advantages that delay to procure a warrant would have presented." *United States* v. *Williams*, 612 F.2d 735, 739 (3d Cir. 1979), cert. denied, 445 U.S. 934 (1980).

In this case, the police surrounding the Bergstroms' house knew that respondent had overheard the detective's

telephone call to Julie Bergstrom and that respondent was therefore tipped off that the police were pursuing respondent and knew his whereabouts. The police were also aware that respondent was implicated in a violent crime and might well be armed. In addition, upon realizing that the police had surrounded the house, respondent could have taken one of the Bergstroms hostage in an attempt to make good his escape. Alternatively, he could have barricaded himself in the Bergstroms' upper unit and engaged in a shoot-out with police. Of course, if respondent possessed any evidence implicating him in the gasoline station robbery and murder, any delay would have given respondent an opportunity to destroy it.

The police should not have to assume those risks. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967). Nor must police stand idly by when they have a "realistic expectation that any delay would result in destruction of evidence." *United States* v. *Santana*, 427 U.S. 38, 43 (1976). See *Welsh* v. *Wisconsin*, 466 U.S. at 754; *Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970).

The police decisions to dispatch officers to the scene and to call Julie Bergstrom cannot be criticized as attempts to create a situation in which exigent circumstances would require the police to effect a warrantless entry to arrest respondent. The informant's tip, which suggested that respondent intended to flee, justified the dispatch of police officers to the Bergstroms' house. Once there, the police were certainly justified in attempting to lure respondent outside to effect a warrantless arrest outside the Bergstroms' home. The alternative—staking out an unfamiliar building with an unknown number of exits and

thereby immobilizing significant and limited police resources—is unreasonable. See *Payton* v. *New York*, 445 U.S. at 619 (White, J., dissenting) ("[T]he costs of such a stakeout seem excessive in an era of rising crime and scarce police resources.").[14]

Nor would it have been sufficient for the police to obtain a warrant for respondent's arrest, as the Minnesota Supreme Court seemed to assume. Quite apart from the question whether a warrant could have been obtained in one hour on a Sunday afternoon, an arrest warrant would not have authorized the entry into the Bergstroms' house to arrest respondent. See *Steagald* v. *United States, supra.* If the police officers needed a warrant to enter, they needed a search warrant.[15] Before the officers overheard respondent whispering to Julie Bergstrom, the only evidence they had that respondent was staying with the Bergstroms was the statement of the Bergstroms' down-

[14] In any event, it was unlikely that the continued presence of "[t]hree or four Minneapolis police squads" would long have gone unnoticed by respondent or curious neighbors. Pet. App. A10-A11. It is well known that a covert stake-out is difficult to implement and maintain. See *United States* v. *Salvador*, 740 F.2d at 758; *United States* v. *Williams*, 612 F.2d at 739.

[15] It is an open question whether a defendant in respondent's position could get evidence suppressed if the police enter the premises of a third party to arrest the defendant, when they have only an arrest warrant for the defendant and not a search warrant for the premises. Compare *United States* v. *Underwood*, 717 F.2d 482, 483-485 (9th Cir. 1983) (no suppression), cert. denied, 465 U.S. 1036 (1984), with *id.* at 486-492 (Skopil, J., dissenting) (suppression required); 4 W. LaFave, *Search and Seizure* § 11.3(b), at 297-298 (2d ed. 1987). What is not subject to question, however, is that an unconsented entry under those circumstances would violate the Bergstroms' rights. If the Minneapolis police wished to avoid violating anyone's rights under the Fourth Amendment, and the circumstances were not exigent, they would not enter the Bergstroms' house with only an arrest warrant.

stairs neighbor, which might well have been insufficient to justify a search warrant for the Bergstroms' home. The action the police took was therefore reasonable, and they did not forgo any readily available line of investigation that could have avoided the warrantless entry to effect respondent's arrest.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Minnesota should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
STEPHEN J. MARZEN
Assistant to the Solicitor General

NOVEMBER 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00607